

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

STEVEN ST. MARIE,
Complainant

v.

Docket No. 04 SEM 01589

ISO NEW ENGLAND, INC.
Respondent

Appearances: Mark H. Bluver, Esq. and Erin F. Thron, Esq., for Complainant
Joan Ackerstein, Esq. and Robert H. Morsilli, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 15, 2004, Steven St. Marie (“Complainant”), filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that ISO New England, Inc. (“Respondent”) retaliated against him by unlawfully terminating his employment for filing discrimination claims against ISO’s predecessor, Northeast Utilities and another entity, New England Power Pool.

The MCAD issued a probable cause finding on the claim of retaliation and certified the case for public hearing on December 5, 2006. Respondent moved to bifurcate the issues of liability and remedy. On February 7, 2007, the Hearing Officer agreed to the bifurcation request. Per order of February 13, 2007, the Hearing Officer also issued an order precluding Respondent from relying on events that occurred prior to

September 12, 2003, the date on which the parties entered into a Settlement Agreement relative to the parties' pre-September 12, 2003 employment relationship.

A public hearing was conducted on June 11, 12, 13, and 15, 2007 and September 4, 5, and 7, 2007 on the issue of whether Respondent's termination of Complainant was retaliatory under G.L.c.151B. The parties introduced fifty-eight (58) joint exhibits into evidence. Respondents introduced an additional five (5) exhibits into evidence. An additional volume of documents marked as Rejected Exhibits 1-21 was also proffered. Complainant testified on his own behalf and called as witnesses: Steven Weaver, Robert Ludlow, and Steven Whitley. Respondent called the following witnesses: Gordon Van Welie, Thomas Dutkiewicz, Donald Gates, and Christine Campbell. The parties submitted post-hearing briefs on or around December 19, 2007. Attached to Complainant's brief was a portion of the deposition of James McGovern.

The attachment is disregarded on the basis that Complainant did not present good cause for failing to call McGovern as a witness.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or is irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Respondent is a not-for-profit corporation located in Holyoke, Massachusetts and an employer within the meaning of M.G.L. c. 151B. Its primary functions are to manage the bulk electrical power system in New England, to administer

wholesale electricity markets in New England, and to plan for future energy consumption. Employees who work in Respondent's Control Room manage the day-to-day operations of the bulk power electrical generation and transmission system in New England.

2. Complainant was an employee of Respondent and its predecessors, Western Massachusetts Electric and Northeast Utilities, for more than twenty-one years prior to his termination in January of 2004. Complainant was promoted to the position of Shift Supervisor in 1998. During the course of his employment with Respondent and its predecessors, Complainant has been a Hydroelectric Plant Electrician and Operator, an Electrical Substation Maintenance Operator, a Power Pool Coordinator, a System Operator, and a Control Room Shift Supervisor ("Shift Supervisor").
3. In 1996, Complainant was among a group of seven employees who filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission") charging Respondent's predecessors with age discrimination. Transcript, Day 3 at 115-117. The basis for the charge was that Complainant and his co-plaintiffs were not selected for the position of Shift Supervisor. While the 1996 charge was pending, Complainant filed a second complaint with the Commission in 1997 charging that Respondent and its Human Resource Manager, Linda Swanson, retaliated against him in response to the 1996 charge. In February of 1999, the Commission issued a finding of Probable Cause for the 1996 and 1997 complaints. Complainant and his co-plaintiffs removed their

discrimination complaints to Superior Court where they were consolidated.

Exhibit 45, Bate Stamp 000062.

4. As a Shift Supervisor from 1998-2003, Complainant was in charge of a team of System Operators who operated under his direction.
5. Complainant oversaw a team of System Operators in Respondent's Control Room. Each team is responsible for ensuring that the energy transmission system provides sufficient power to meet New England's energy demands. Transcript, Day 1 at 132, 215; Exhibits 31-33. The team of System Operators supervised by Complainant consisted of a Senior System Operator and three System Operators. The Senior System Operator handles energy transactions between Respondent and other entities and provides back-up support to the three System Operators. Transcript, Day 1 at 131. One of the System Operators is designated as the Security Operator and is responsible for monitoring the transmission system. Id. at 130-131. Each team works a twelve hour shift, either 7:00 a.m. to 7:00 p.m. or 7:00 p.m. to 7:00 a.m.
6. Complainant's 2000 performance evaluation assigned him an overall performance rating of "meets expectations." His supervisor, John Norden, commented that Complainant, "provides fully satisfactory supervision to his team," "accepts change and finds new ways to deal with problems," is "an effective and informed decision maker," "has the trust and respect of his team," "holds himself to a high standard of integrity," "does well at looking ahead and managing corporate risks," and "continues to perform well in very stressful situations. His experience and sense of duty is [sic] an asset for the company." Exhibit 32.

7. In December of 2000, all parties to the Superior Court action participated in mediation. Complainant's co-plaintiffs, including Dennis McGroarty and Seamus McGovern, supported a proposal for settlement consisting of a \$15,000.00 payment to each employee and a \$25,000.00 payment to their attorney. Northeast Utilities was to pay each of the employees and the attorneys fees. Complainant originally agreed to the proposed settlement in response to "enormous pressure from his colleagues" but subsequently rescinded his agreement in the latter part of December of 2000. Exhibit 45 at Bate Stamp 000063-5; Transcript, Day 2 at 17-18; Day 3 at 117. As a result of Complainant's opposition to the settlement, his attorney filed a motion in Superior Court dated January 19, 2001 to vacate the proposed dismissal of the consolidated discrimination claims. Exhibit 45 at Bate Stamp 000059. Defendants successfully opposed the motion to vacate and moved for enforcement of the settlement agreement, in response to which Complainant filed an appeal on September 10, 2001. *Id.* at Bate Stamp 000120. Defendants finally settled with all the plaintiffs except for Complainant in December of 2001, after a one-year delay in the payment of settlement funds. Transcript, Day 2 at 21; Exhibit 53.
8. At some point in 2001, prior to the payment of settlement funds, Seamus McGovern became the Control Room Supervisor.¹ McGovern became Complainant's immediate supervisor. Transcript, Day 3 at 118.
9. McGovern assigned Complainant an overall performance rating of "meets expectations" in his 2001 performance evaluation. McGovern acknowledged that Complainant had "many good power system operator and supervisor dispatch

¹ The position was renamed Manager of Control Room Operations some time after 2004.

qualities” but noted that Complainant needed “to take a stronger leadership role with his team.” Exhibit 32. The evaluation states that Complainant did not perform his shift supervisor functions “to the level expected” during extreme reliability events, that he was “inconsistent in listening to and giving directions,” that he was “slow to act in power system emergency and will rely on subordinate inexperienced operators to take the lead,” and that he did “not apply his experience and knowledge in a proactive manner ... especially in stressful situations.” Id.

10. McGovern assigned Complainant an overall performance rating of “meets expectations” in his 2002 performance evaluation. Exhibit 33. McGovern commented that, “Steve has improved on his overall performance from last year, however, we feel that there is still room for improvement. We would like to see Steve take a stronger approach to team building and communication, and in understanding better his responsibility as a supervisor to be more critical when determining his team members (sic) job performance. Steve does a good job of recognizing individual strengths, but does not seem willing to recognize and take action on team deficiencies or weaknesses. I am confident that once given the proper training Steve will excel in this area.” Id.

11. Complainant received annual merit pay increases in 2001, 2002 and 2003, although his 3.3% merit pay increase in 2003 was less than the 3.9% average merit increase for Respondent’s employees in 2003. Transcript, Day 3 at 107-109; Day 7 at 91-92. Merit pay increases are customary for approximately 99% of Respondent’s workforce. Transcript, Day 7 at 90. In 2002, Complainant

- received a certificate of recognition for his twenty years of service with Respondent. Transcript, Day 5 at 54-55. Respondent awards certificates of recognition to employees upon completion of every five years of service. Id.
12. In the summer of 2003, Human Resource Manager Linda Swanson was negotiating her own severance package with Respondent and requested indemnification against the claims Complainant made against her. Rather than indemnify Swanson, Respondent entered into an agreement with Complainant on September 12, 2003 in settlement of his 1996 and 1997 claims. Exhibit 23. The agreement mooted Swanson's request for indemnification. Pursuant to the September 12, 2003 settlement agreement, Complainant received \$25,000.00 of which \$5,000.00 was paid by Respondent ISO. Id.
13. The settlement states as its purpose: "to fully and finally settle and terminate any and all differences, disputes, claims, and disagreements between them² regarding [Complainant's] employment and the alleged discrimination and retaliation against him." Exhibit 23, pp. 1-2.
14. According to the current Manager of Control Room Operations Steven Weaver, the position he occupies (and its predecessor, Control Room Supervisor) has a work day from approximately 7:00 or 8:00 a.m. to 4:30 p.m. The Manager/Supervisor might be out of the Control Room for much of the day whereas a Shift Supervisor would only leave the Control Room once or twice a day, for minutes at a time. Id. at 140-141. Weaver testified that he would not

² The parties to the settlement agreement were Complainant Steven St. Marie and Defendants Northeast Utilities, Northeast Utilities Service Company, New England Power Pool, Linda Swanson and ISO New England Inc. Exhibit 23.

expect the Shift Supervisor to leave the Control Room at all during an emergency.

Id. at 141.

15. At 6:21 p.m., on the evening of December 1, 2003, Cape Cod and southeastern Massachusetts suffered an electrical outage causing a blackout lasting approximately two hours which affected approximately 300,000 homes.³ Exhibit 9 at p. 9. Complainant was the Shift Supervisor on the 7:00 a.m. to 7:00 p.m. shift on December 1, 2003, Dennis McGroarty was the Senior System Operator, and David Cyr was the Security Operator. Transcript, Day 1 at 55.

16. The events leading up to the outage began at the start of the day, with the Canal 1 generator (one of two major generators each producing approximately 550 MW of power to Cape Cod)⁴ out of service due to mechanical failure. Transcript, Day 1 at 150; Exhibits 9 and 26. At 6:39 a.m., the 117 line (one of two minor 115 kV transmission lines each capable of carrying approximately 200 MW of electricity into Cape Cod)⁵ was removed from service for scheduled maintenance. Id.; Transcript, Day 5 at 119. At 1:28 p.m., the 331 line (one of two major 345 kV transmission lines each capable of carrying approximately 1000 MW of electricity into Cape Cod)⁶ was also removed from service because of brush fires on the ground underneath the line. Id. at 110; 117. Following the removal of the 331

³ Respondent alleged, but presented no supporting evidence, concerning its assertion that a death resulted from the outage. Senior Vice President Steven Whitley testified that he couldn't recall whether he knew about the alleged death at the time he made the decision to terminate Complainant. Transcript, Day 3 at 103. Based on the foregoing, I discount Respondent's repeated hearsay statements concerning a blackout-related fatality.

⁴ The Canal generating station, also known as the "Canal bus" has two major generators known as Canal 1 and Canal 2. Respondent's Exhibit 2.

⁵ The other 115 kV transmission line carrying electricity to Cape Cod is the D21 line. Respondent's Exhibit 1.

⁶ The 331 line becomes the 322 line after it leaves the Carver station. Respondent's Exhibit 1. The other 345 kV transmission line that supports Cape Cod is the 342 line. Id. These lines carry electricity to the Canal bus, from which electrical power is then disseminated through smaller transmission lines across Cape Cod. Transcript, Day 1 at 149-150.

- line from service, one-half of the available power sources to Cape Cod were inoperable. Transcript, Day 1 at 153.
17. McGovern, the Control Room Supervisor, left the Control Room shortly after Complainant told him that the 331 line was being removed from service. Transcript, Day 2 at 150; Day 3 at 82, 99-100, 104, and 112.
18. At 1:49 p.m., Security Operator David Cyr opened the 312 breaker at the Canal station after consulting with Senior System Operator McGroarty and the REMVEC Operator.⁷ The Security Operator is primarily responsible for monitoring the security of the bulk power system, subject to the Shift Supervisor's responsibility to manage the minute to minute operations of the Control Room.
19. Cyr and the REMVEC Operator agreed that breaker 312 should be opened after running a Study Contingency Analysis (STCA) and consulting the Transmission Stability Operating Guide for the 331 line being out of service (the "331 Stability Guide"). They took this action to protect the stability of the Canal 2 generator (the second of two major generators providing power to Cape Cod) but failed to determine that opening the breaker would result in a thermal overload. Transcript, Day 4 at 41; 101; Exhibit 9 at 10 and 26. The Study Contingency Analysis and a power flow analysis both indicate that a thermal overload would result from the contingency of losing Canal 2. Exhibit 9 at p. 10. Neither Complainant nor Cyr performed a manual power flow. Transcript, Day 4 at 109-110.

⁷ REMVEC interfaces between Respondent and various transmission owners. At the time relevant to this dispute, it was the satellite dispatch entity for eastern Massachusetts, Rhode Island, and Vermont. Transcript, Day 1 at 132-134.

20. Complainant authorized the opening of the 312 breaker after reviewing the 331 Stability Guide with Cyr and McGroarty. Transcript, Day 4 at 43. Complainant testified that he did not focus on the fact that the 117 line was out of service because contingency analysis software was running every nine minutes and took this factor into consideration. Id. at 44.
21. At approximately 6:00 p.m., the Control Room was notified of a fire in the Canal 2 generator. At 6:16 p.m., the Canal 2 generator shut down which caused the opening of circuit breakers 412 and 512. Exhibit 9 at 5. When the Canal 2 generator shut down, the 342 line also shut down because the Canal 2 generator and the 342 line had become coupled following the opening of the 312 breaker. Transcript, Day 5 at 120; Exhibit 26; Transcript, Day 5 at 118.
22. After Canal 2 and the 342 line shut down, all of the energy to Cape Cod was transmitted through D21, a single 115 kV line. Exhibit 26. Within five minutes of transmitting this energy load, the D21 line experienced a severe thermal overload and tripped, causing a power outage to Cape Cod and the Islands. Transcript, Day 1 at 156; Day 5 at 118.⁸
23. An investigation was conducted by Respondent, NStar, and National Grid⁹ to identify the cause of the outage and to make recommendations for improvements that would decrease the likelihood of a similar event in the future. Transcript, Day 1 at 144-145; Day 3 at 7. A draft investigatory report was initially produced on December 8, 2003 and a subsequent joint report was produced on December 19, 2003. Exhibits 9 and 26. The draft investigatory report states that ISO

⁸ At the time it tripped, the D21 line was carrying approximately twice the power it is equipped to carry. Transcript, Day 5 at 118-119.

⁹ The latter two entities are co-owners of transmission lines in the affected area. Exhibit 26.

(Respondent) and REMVEC operators¹⁰ properly consulted the 331 Stability Guide to address stability concerns relating to the Canal 2 generator, but failed to consider thermal issues relating to transmission lines and thereby placed the bulk power system on Cape Cod at risk of thermal overload. The report asserts that the operators should have discounted the instruction in the 331 Stability Guide to open the 312 breaker because Canal 2 was operating below 475 MW and thus did not pose a risk of instability. Exhibit 9 at p.10. The draft report states that the ISO operator followed correct procedure by running a Study Contingency Analysis but failed to determine that opening the 312 breaker would result in two contingencies that “failed to solve” and would result in severe thermal overloads i.e., that Canal 2 could go off line, trip the 412 and 512 breakers, cause the 342 line to open (i.e., become inoperable), and lead to a thermal overload on D21, the sole remaining 115 kV line into Cape Cod. Exhibit 9 at p. 10; Transcript, Day1 at 72; Day 7 at 83-84.

24. The Complainant testified that he understood it was unnecessary to open the 312 breaker as long as Canal 2 generator produced less than 475 MW of power but that he lacked a documented reason backed up by a study to restrict the generation of power from the Canal 2 generator. Transcript, Day 4 at 83-84. He also testified that he did not think about how the outage of the 117 line on December 1, 2003 would impact the bulk power system on Cape Cod. Transcript, Day 4 at 41.

¹⁰The conclusion section of the report refers to the ISO and REMVEC “operators” and the ISO “operator.” Steven Weaver, who headed the investigatory team in his then-capacity as Respondent’s Internal Operations Consultant, testified that the references to ISO operator were to Security Operator David Cyr. Transcript, Day 1 at 213-214.

25. According to Thomas J Dutkiewicz, retired Manager of Respondent's Operations Department and Transmission Operations Planning Group, the cause of the power outage was the lack of an adequate assessment of thermal performance of the system. Dutkiewicz testified that Stability Guides do not address thermal and voltage considerations. He asserted that thermal matters must be evaluated using software programs such as the Real Time Contingency Analysis (RTCA) which analyzes contingencies every nine minutes, the Study Contingency Analysis (STCA) which works with approximately 800 predefined contingencies, and manual power flows which study specific contingencies. Transcript, Day 1 at 82, 167-168; Day 5 at 120, 144-145. The last page of Exhibit 9 states, in part, that: "If a breaker **cannot be opened**, limit the output of Canal station as follows: 1) One unit on – 475 MW max. 2) Two units on – 700 MW max." [emphasis supplied] Dutkiewicz testified that the 312 breaker "cannot" be opened because of a potential thermal overload on the remaining transmission line running into Cape Cod and the fact that the Canal 2 generator did not pose a stability risk since it was generating less than 475 MW of electricity. Transcript, Day 6 at 55-56, Day 4 at 83-84. According to Dutkiewicz, a generator experiences instability if it produces more electricity than can flow over the available transmission lines whereas a transmission line experiences a thermal overload if it cannot handle the amount of electrical power flowing over the line. Transcript, Day 5 at 141-142. If transmission lines become overheated, they trip off line and cause a loss of power. Id. at 142.

26. Following the December 1, 2003 blackout and the publication of the draft and final investigatory reports, Senior Vice President/Chief Operating Officer Stephen Whitley made the decision to terminate Complainant. Whitley testified that he is Respondent's highest ranking officer from an operational standpoint. Transcript, Day 3 at 68. He testified that he made the decision to terminate Complainant based on Complainant's failure to exercise leadership in the Control Room during the day of the outage, Complainant's departure from the Control Room at 6:00 p.m. on December 1, 2003 to attend to routine matters, Complainant's insistence on blaming the Stability Guide rather than accept any responsibility for the power outage, and Complainant's two prior performance issues. The prior performance issues took place between 2000-2001 and involved: 1) Complainant leaving the Control Room during an approaching snowstorm and 2) Complainant displaying an effigy of his supervisor in a noose, allegedly as a joke. Transcript, Day 2 at 74 and 165; Day 3 at 100-102.

27. Prior to terminating Complainant's employment, Whitley conferred with Respondent's Chief Financial Officer, Robert Ludlow, about Complainant's termination. Whitley and Ludlow testified that they did not discuss the prior settlement agreement. Transcript, Day 2 at 27; Day 3 at 59. Whitley testified that at the time he terminated the Complainant, he was aware that Complainant had brought a claim against the Company, but was not aware that the Company had entered into a settlement with and the payment of funds to Complainant approximately four months earlier. Transcript, Day 3 at 52, 62. I do not credit Whitley's testimony that he had no knowledge of the settlement

agreement at the time he made the decision to terminate Complainant, nor do I credit Ludlow's testimony that he did not inform Whitley that a settlement agreement had been executed in September of 2003.

28. Complainant was terminated on January 27, 2004. At the time of his termination, Complainant earned \$148,519.0. Exhibit 29, p. 9. Complainant testified that immediately after he was informed of his termination, he was escorted to his desk to gather his personal belongs, escorted to the exit, and let out the gate.

29. Security Operator David Cyr and Senior System Operator Dennis McGroarty each received a one-day suspension as a result of their performance on December 1, 2003. Both Cyr and McGroarty grieved their discipline pursuant to the Collective Bargaining Agreement between Respondent and IBEW Local 445. The parties entered into a settlement agreement which provided that Cyr's one-day suspension would not be served and that all references to this discipline would be removed from his personnel file if he had no further performance issues prior to December 31, 2006. McGroarty's one day suspension remained in place but the agreement provided that all references to his discipline would be removed from his personnel file if he had no further performance issues prior to December 31, 2006. Exhibit 44.

30. During the period between December 1, 2003 and Complainant's termination on January 27, 2004, Complainant continued to work in his Shift Supervisor's role. Whitley testified that Gates and McGovern paid closer attention to the Control Room during those shifts and that David Cyr was removed from the Complainant's team. Transcript, Day 3 at 45.

31. Following the outage, Respondent changed the 331 Stability Guide to a Cape Cod Area Operations Guide and removed the option to open either the 312 breaker or the 512 breaker. Exhibit 26. The revised guide incorporates thermal and voltage analysis. It provides that operators should either open the 412 breaker or restrict generation. Id.

III. CONCLUSIONS OF LAW

Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. Retaliation is a separate claim from discrimination, “motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices.” Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000), *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). Complainant alleges that he opposed the prohibited practice of age discrimination by filing a charge at the MCAD, by refusing to join in a class settlement of the claim in which each plaintiff received \$15,000.00, and by subsequently demanding and receiving \$25,000.00 (of which \$5,000.00 was paid by ISO) to settle his lawsuit against Respondent. Complainant contends that his termination was in retaliation for this protected activity.

To prove a prima facie case for retaliation, Complainant must demonstrate that he: (1) engaged in a protected activity; (2) Respondent was aware that he had engaged in protected activity; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection existed between the protected activity and the adverse

employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000).

Under M.G.L. c. 151B, s. 4(4), an individual engages in protected activity if he “has opposed any practices forbidden under this chapter or ... has filed a complaint, testified or assisted in any proceeding under [G.L.c.151B, s.5].” While proximity in time is a factor, “... the mere fact that one event followed another is not sufficient to make out a causal link.” MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996), *citing Prader v. Leading Edge Prods., Inc.*, 39 Mass. App. Ct. 616, 617 (1996). The fact that Respondent knew of a discrimination claim and thereafter took some adverse action against the Complainant does not, by itself, establish causation, but it may be a significant factor in establishing a causal relationship.

Once a prima facie case is established, the burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See id. Even if the trier of fact finds that the reason for the adverse employment

action is untrue, the fact finder is not required to find discrimination in the absence of the requisite intent. See id.; Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

Complainant has presented a prima facie case of retaliation in that he engaged in the protected activities of filing a complaint of age discrimination in 1996 along with six other employees; of filing, on his own, a 1997 charge of retaliation; of refusing to join in a class action settlement in December of 2000 which resulted in his co-plaintiffs experiencing a one-year delay in receiving their settlement funds; of filing a 2001 motion to vacate the proposed dismissal of his discrimination claims; and of accepting \$25,000.00 (\$5,000.00 of which was paid by Respondent ISO) on September 12, 2003 to settle his claims. Each of these actions, separate or together, constitutes protected activity because each constitutes, “the exercise or enjoyment of any right granted or protected by this chapter,” in this case the right to pursue a good faith challenge to age discrimination at work. G.L.c. 151B s.4, para. 4(A).

While it is true that Respondent only contributed \$5,000.00 towards settling Complainant’s age discrimination case, the Company also incurred attorneys’ fees in opposing Complainant’s motions to revive his age-related claims and in negotiating terms under which its Human Resource Manager would be protected from liability. Moreover, Complainant’s refusal to join in the 2000 settlement agreement of the class action age discrimination case delayed by one year the Company’s settlement of age discrimination claims brought by Complainant’s co-litigants, one of whom was Seamus McGovern, Complainant’s supervisor at the time of the power outage. Court documents from the age discrimination litigation assert that Complainant was under “enormous pressure” by his

co-litigants to join in the settlement. Long term employee Steven Weaver testified that it was common knowledge within the Company that Complainant's co-litigants had settled their age-based claims in 2000 but that Complainant had not. As a result of Complainant's pursuit of his age discrimination claim, Respondent was not totally freed from the specter of liability for age discrimination until September of 2003. These factors support Complainant's contention that his entire history of pursuing age discrimination claims against Respondent, from the filing of charges in 1996 through his settlement just four months prior to his January 27, 2004 termination, constitutes protected activity. Contrast Tavares-Merritt v. Mass. Department of Correction, 25 MDLR 390, 397 (2003) (declining to consider 1993 settlement agreement as protected activity where Respondent gave Complainant provided a legitimate, non-discriminatory reason for non-promotion in 1997); Eldred v. Consolidated Freightways, Inc., 14 MDLR 1163 (1992) (declining to consider settlement agreement executed two years prior to complainant's layoff as protected activity).

There was, to be sure, testimony by Chief Operating Officer/ Senior Vice President Steven Whitley denying that when he made the decision to fire Complainant in January of 2004, he was aware of the payment of settlement funds to Complainant just four months earlier. There was also testimony by Respondent's Vice President and Chief Financial Officer Robert Ludlow denying that he informed Whitley in January of 2004 about the settlement that had been negotiated with Complainant the previous September. The testimony of both witnesses in this regard is not credible. Ludlow admitted that he notified the Company President and CEO, the General Counsel, and the Senior Counsel about the settlement agreement. Why would he refrain from likewise informing Whitley,

the Chief Operating Office/Senior Vice President, during conversations in which he was giving Whitley feedback about the proposal to fire Complainant? Rather than accept such a proposition, I infer from circumstantial evidence and from the witnesses' lack of credibility that Whitley knew about Respondent's payment of monetary compensation to Complainant in September of 2003 to secure a settlement of his age discrimination claims. To conclude otherwise would be to accept the unconvincing proposition that Ludlow, who admitted knowing that a retaliation lawsuit would "likely" follow from Complainant's termination¹¹ and admitted to talking to Whitley "all the time," withheld information from Whitley relative to Complainant's status at the time Whitley was contemplating firing him.

Since I conclude that Whitley did, indeed, know about the payment of settlement funds to Complainant, I calculate that only four months elapsed between this protected activity in September of 2003 and Complainant's termination in January of 2004. This period of time is sufficiently brief to support an inference of causation. See Salvaneli v. Ares-Serono, Inc., 17 MDLR 1138 (1995) (termination within six weeks of protected activity is evidence of causal relationship); Kelley v Plymouth County Sheriff's Department, 22 MDLR 208 (2000) (retaliatory motive can be inferred from transfer within two months of protected activity).

Also supporting an inference of causation is the fact that other employees, who worked in the Control Room on December 1, 2003 and did not possess the same protracted litigation history against the Company as did Complainant, received minimal or no discipline. The Security Operator received a one-day suspension which he never served, the Senior System Operator received and served a one-day suspension, and the

¹¹ Transcript, Day 2 at 28.

Control Room Supervisor received no discipline.¹² While none of these individuals occupied the same position as Complainant, they all had crucial roles in maintaining day-to-day operations of the bulk power system in New England. Their differences in rank, duties, and quality of performance, arguably justify different levels of discipline but not the enormous disparity which exists in this case. See Trustees of Health and Hospitals of the City of Boston, Inc. v. MCAD, 449 Mass. 675 (2007) (white and black employees held to be similarly-situated relative to layoff procedure despite differences in rank, work hours, and client contact). These circumstances support the existence of a causal connection between Complainant's protected activity and his termination.

The burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for Complainant's termination, supported by credible evidence. Respondent asserts that Complainant's failure to make an adequate assessment of the thermal performance of the system on December 1, 2003, plus two prior incidents, satisfy this burden. Respondent lays at Complainant's feet, in his role as 7:00 a.m. to 7:00 p.m. Shift Supervisor on December 1, 2003, responsibility for the fact that at 6:21 p.m., Cape Cod and southeastern Massachusetts suffered an electrical outage causing a blackout lasting approximately two hours which affected approximately 300,000 homes.

It is undisputed that Complainant had the responsibility for overseeing a team of system operators on the December 1, 2003 shift who were charged with monitoring the security of the bulk power system. Team members included Senior System Operator

¹² The Security Operator, David Cyr, was not a member of the original age discrimination lawsuit. Senior System Operator Dennis McGroarty and Control Room Supervisor Seamus McGovern were plaintiffs in the 1996 class action age discrimination lawsuit but settled with the Company in December of 2000. Transcript, Day 6 at 182. Their settlement imposed no financial liability on Respondent.

Dennis McGroarty and Security Operator David Cyr. Complainant, in turn, was supervised by Seamus McGovern, Control Room Supervisor. Whereas Complainant worked a twelve hour shift and was expected to leave the Control Room only for short periods several times a day and not at all during emergencies, the Control Room Supervisor worked an eight-hour shift daily and might leave the Control Room for much of the day.

The events leading up to the outage began at the start of the day, with the Canal 1 generator -- one of two major generators producing power for Cape Cod -- out of service due to a mechanical failure. At 6:39 a.m., the 117 line -- a minor transmission line -- was removed from service for scheduled maintenance. At 1:28 p.m., the 331 line -- a major transmission into Cape Cod -- was also removed from service, rendering inoperable one-half of the available power sources to Cape Cod. At 1:49 p.m., Complainant authorized the opening of the 312 breaker at the Canal Station after consulting with Security Operator Cyr and Senior System Operator McGroarty, reviewing a Study Contingency Analysis (STCA), and studying the 331 Stability Guide. Neither Complainant nor the operators under his supervision anticipated that opening the breaker would result in a thermal overload.

Respondent asserts that Complainant and his operators failed to properly execute and read the Study Contingency Analysis, failed to run a power flow analysis, failed to properly interpret the 331 Stability Guide relative to thermal considerations, failed to notice that the 117 line was out of service, and failed to anticipate that the contingency of losing Canal 2 would result in a severe thermal overload and a power outage on Cape Cod. Respondent claims that such a thermal overload and power outage is exactly what

occurred when the Control Room was notified at approximately 6:00 p.m. on December 1, 2003 that a fire was shutting down the Canal 2 generator, resulting in the opening of circuit breakers 412 and 512, the shut down of the 342 line (which had earlier coupled with the Canal 2 generator following the opening of the 312 breaker) and the diverting of all energy transmission to Cape Cod through D21, a minor transmission line.

According to Respondent, the Complainant should have taken steps to avoid this blackout by heeding the language in the 331 Stability Guide which recognizes that in some circumstances breaker 312 “cannot be opened.” Respondent asserts that Complainant should have refrained from opening the 312 breaker in order to prevent a potential thermal overload on the remaining transmission line running into Cape Cod since the Canal 2 was operating below 475 MW and, thus, did not pose a risk of instability. Senior Vice President/Chief Operating Officer Stephen Whitley testified that he made the decision to terminate Complainant based on Complainant’s failure to exercise leadership in the Control Room during the day of the outage, his departure from the Control Room at 6:00 p.m. on December 1, 2003 to attend to routine matters, his insistence on blaming the 331 Stability Guide rather than accept any responsibility for the power outage, and his two prior performance issues involving a decision to leave the Control Room during an approaching snowstorm and the display of an effigy of his supervisor in a noose. Respondent’s evidence about Complainant’s performance as Shift Supervisor is sufficient to satisfy Respondent’s burden at stage two.

At stage three, the burden shifts back to Complainant to prove that the articulated justification is not the real reason, but a pretext for discrimination. After reviewing all of the complex facts associated with this case, I conclude that Complainant has satisfied the

burden of proving that his termination was motivated primarily -- although not solely -- by his pursuit of an age discrimination claim against Respondent. Whitley's unconvincing denial of any knowledge about the settlement in conjunction with Ludlow's unconvincing denial that he informed Whitley about the settlement, undermine Respondent's position that Complainant was fired only for job-related deficiencies rather than in retaliation for his initiation, litigation, and settlement of legal action against the Company.

Complainant's conduct on December 1, 2003 was not blameless, but it does not support his termination in light of the lack of or minimal discipline imposed on his co-workers. Complainant testified that he did not focus on the impact of the 117 line being out of service because he expected that the real time contingency analysis software running every nine minutes would take this factor into consideration. Complainant testified, as well, that he understood it was unnecessary to open the 312 breaker as long as the Canal 2 generator produced less than 475 MW of power but that he lacked a documented reason, backed up by a study, to restrict the generation of power from the Canal 2 generator. Complainant's assertion is supported by the fact that Respondent recognized that the 331 Stability Guide was "confusing" and changed it after the power outage to remove the option to open the 312 breaker or the 512 breaker. The revised Cape Cod Area Operations Guide incorporates thermal and voltage analysis. It provides that the operator should either open the 412 breaker or else restrict generation. No such direction about opening the 412 breaker appeared on the 331 Stability Guide on December 1, 2003.

Additional factors point to mistakes on the part of the Security Officer for which Complainant was held responsible. First, it was the Security Operator, not Complainant, who ran the Study Contingency Analysis (STCA), failed to observe that opening the 312 breaker resulted in two contingencies which failed to solve, and never notified Complainant of the unsolved contingencies. Transcript, Day 1 at 73-75; 83-84. Second, it was the Security Operator who erroneously failed to run a power flow analysis. Transcript, Day 1 at 87-88. Third, it was the Security Operator who failed to notice unsolved contingencies on the real time contingency analysis. Transcript, Day 1 at 90; Day 3 at 131. This omission was addressed after December 1, 2003 by a change in software which flashed unresolved contingencies at the operators' desks and by a SOP instructing security operators to review real time contingencies on an ongoing basis. Transcript, Day 1 at 90, 95.

It is, no doubt, true that Complainant should have worked more closely with his team to review the 331 Stability Guide prior to opening the 312 breaker, should have anticipated contingencies which could adversely affect the bulk power system, should have anticipated ways of reconfiguring the system to ensure that power would not be lost, and should not have left the Control Room during an emergency. These concerns could have been addressed in other ways short of terminating Complainant's employment, particularly in light of performance evaluations recognizing his strengths over twenty-one years of employment. The decision to terminate Complainant was so unduly harsh as to render it suspect and therefore discriminatory. While Respondent maintains that it does not have a policy of transferring non-performing employees to other roles, there is no evidence that Respondent was prevented from reassigning a twenty-one year employee to

a position it deemed to be a better fit for his skills and abilities. Such action would not have conflicted with Respondent's position that significant discipline was warranted.

Respondent's critique of Complainant's performance on December 1, 2003 also ignores the crucial roles played by others in the Control Room on that day. Complainant did not have primary responsibility for monitoring system software as did David Cyr, the Security Operator who never notified Complainant of unsolved contingencies and who failed to run a power flow contingency analysis. Complainant did not have the primary responsibility for handling energy transactions between ISO and other entities and providing back-up support to the three System Operators as did Dennis McGroarty, the Senior System Operator who failed to counsel his less experienced co-workers.

Transcript, Day 1 at 76, 169, 176; Day 3 at 106. Nor did Complainant bear ultimate responsibility for the Control Room as did Seamus McGovern, the Control Room Supervisor who left the Control Room shortly after learning that the 331 line was out commission and failed to exercise any oversight during the emergency.¹³ Neither McGroarty, who reported to Complainant, nor McGovern, to whom Complainant reported, received a single day's suspension for the blackout. Cyr, who reported to Complainant, received a one-day suspension for failing to adequately monitor the system software and report critical information to Complainant. Whitley testified that he was, "disappointed in ... the whole team" and that the power outage was a black mark on the

¹³ Respondent argues that it was the Shift Supervisor who exercises ultimate authority for the "minute-to-minute" management of the bulk power system in the Control Room. However, Whitley acknowledged that it was inappropriate for McGovern to leave the Control Room during an emergency situation. Transcript, Day 2 at 150; Day 3 at 99-100. The evidence also establishes that subsequent to the events of December 1, 2003, an improvement action plan was put into effect which said that the 312 breaker could not be opened unless the Control Room Supervisor/Manager of Control Room Operations approved and a transmission operations sign-off was obtained. Transcript, Day 1 at 102-103.

“entire ISO.” Transcript, Day 3 at 122. Notwithstanding this blanket condemnation, the only individual to receive any significant discipline was Complainant.

Whitley justified his termination of Complainant on the fact that the power outage was, “the third of three significant management leadership events where his behavior was less than even marginal.” Transcript, Day 3 at 165. The two prior events referred to by Whitley took place in 2001. They involved Complainant’s decision to leave the Control Room during an approaching snowstorm and his display of an effigy of his supervisor in a noose. These events must be discounted for two reasons. First, following these incidents, Complainant received an overall performance rating of “meets expectations” in his 2002 performance evaluation, with the comment that his overall performance had improved from the prior year.

Second, the September 12, 2003 settlement agreement between the parties states as its purpose: “to fully and finally settle and terminate any and all differences, disputes, claims, and disagreements between them regarding [Complainant’s] employment and the alleged discrimination and retaliation against him.” Since the prior events can reasonably be characterized as differences or disputes between the parties regarding Complainant’s employment, the settlement agreement should be deemed to wipe them clean. See Schuster v. Baskin, 354 Mass. 137, 140 (1968) (General releases are fully enforceable and broadly construed). A release within a settlement agreement covering “all claims and demands” is considered broad and general, and it is to be given effect even if the parties did not have in mind all wrongs which existed at the time of the release.” Id. Whitley was ultimately permitted to testify that the prior events influenced his state of mind when making the termination decision, but the settlement agreement makes clear that they

should not have played a role in deciding what action, if any, to take against Complainant for the events of December 1, 2003.

The fact that Respondent imposed disproportionate discipline only on Complainant -- who pursued his age discrimination claim after his fellow litigants gave up, forced the Company to incur expenses relative to settling his claim, and caused a year-long delay in the disbursement of settlement funds to his co-litigants -- supports a determination that it was Complainant's protected activity rather than his conduct on December 1, 2003 which accounted for his termination. Accordingly, I conclude that Complainant was subjected to retaliation prohibited under G.L.c.151B.

IV. REMEDIES AND DAMAGES

Since Respondent's motion to bifurcate liability from damages was granted per order of February 7, 2007, a further hearing will be conducted regarding remedies and damages.

This decision represents the final order of the Hearing Officer on the issue of liability.

So ordered this 12th day of March, 2008.

Betty E. Waxman, Esq.
Hearing Officer

